IN THE

Supreme Court of the United States

TERM 1960

No.

ALBERT CALVO, DAVID DRENNAN
AND JOHN FARRELL,

Petitioners,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

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STATE OF LOUISIANA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Albert Calvo, David Drennan and John Farrell pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana, entered in the case entitled State of Louisiana versus Albert Calvo, David Drennan and John Farrell, No. 44,991 of the Docket of the Supreme Court of Louisiana on May 31, 1960, rehearing applied for June 13, 1960 and denied June 28, 1960.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported in 121 S (2d) 244 and a copy is attached hereto as Appendix A. (Rule 23 (1) (i) Rules Supreme Court of the United States.)

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

The decision of the Supreme Court of Louisiana is final because there is no further action possible after the rehearing has been denied. Rule XII (3) Rules of the Supreme Court of Louisiana, R. S. 15:563; *Department of Banking, State of Nebraska v. Pink*, 317 U. S. 264. 63 Sup. Ct. 233 (1942).

The Supreme Court of Louisiana granted an order staying execution of its decree on August 15, 1960.

QUESTION PRESENTED

Whether the laws of the State of Louisiana and the jurisprudence of the Supreme Court of Louisiana fail to provide to petitioners a means whereby they can effectively claim protection against Double Jeopardy in that Louisiana permits multiple prosecution as high as eight to ten times for the same act; and whether this failure to so provide constitutes a lack of due process under the 14th amendment to the Constitution of the United States, this being a substantial question of federal law not heretofore determined by this court.

CONSTITUTION OF PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments of the United States Constitution. See Appendix B for texts of Louisiana Statutes involved.

STATEMENT OF THE CASE

The petitioners were originally indicted by the Grand Jury for the Parish of Orleans, State of Louisiana for the crime of murder of Fernando Rios on September 28, 1958. This case was docketed as No. 161-757, of the Criminal District Court, Parish of Orleans. A Bill of Particulars subsequently stated that the State elected to proceed under the so called felony-murder doctrine of Louisiana law, La. Rev. Stats. 14:30 (2) and that the felony was the robbing of the same Fernando Rios. Petitioners were tried and acquitted completely as to this indictment on January 23, 1959. Four days later, to wit on January 27, 1960, the Grand Jury for the Parish of Orleans, returned an indictment in two counts charging conspiracy to rob Fernando Rios on September 28, 1958 and robbery of Fernando Rios on September 28, 1958. This indictment was docketed as No. 162-852, Criminal District Court, Parish of Orleans. A plea of former jeopardy to this second indictment was upheld by the trial judge, but the State of Louisiana prosecuted an appeal from that judgment and the Supreme Court of Louisiana reversed the decision of the lower court, overruling the plea of former jeopardy and ordering the case to proceed in the lower court. An application for a rehearing was denied. Thus the next step which faces the petitioners is a trial in the lower court on the second indictment. The decision of the Supreme Court of Louisiana is final on that point: petitioners must face trial on the second indictment unless this court intervenes.

The Federal question was raised in the application for a rehearing. It could not have been raised sooner, be-

cause the decision of the Supreme Court of Louisiana was the last link in a series of steps culminating in what petitioners contend accumulate to a denial of due process under the Fourteenth Amendment.

REASONS IN SUPPORT OF GRANTING WRIT

I

FINALITY OF DECREE AND JUDGMENT OF THE SUPREME COURT OF LOUISIANA

A. 28 U.S.C. 1257 (3) which is relied upon in this case, requires that the judgment or decree complained of be "final".

B. The judgment and decree of the Supreme Court, as to which a rehearing has been denied, is final and absolute as to petitioners right not to be tried on the indictment in the second case (No. 162-852) because the result of the decree leaves no other alternative. The case has been remanded *for trial*, and the next step in the proceedings in the lower court will be trial.

C. The protection of the double jeopardy concept is not merely against double punishment but exists also against double trial. This is the *non bis vexari* aspect of the concept.

In *U. S. v. Ball*, 163 U.S. 662 at 669, 16 Sup. Ct. 1192 (1896) the court said:

> "The prohibition is not against being twice punished but against being twice put in jeopardy . . . "

In *Ex Parte Lange*, 18 Wall 163 at 169, (1873) the court said:

> "The common law not only prohibited a second punishment for the same offense but it went further and forbade a second trial for the same offense . . . "

This idea has been expressed more recently in the case of *Green vs. United States*, 355 U.S. 184 at 187, 78 Sup. Ct. 221 (1957), as follows:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

For these reasons, petitioners respectfully suggest that the opinion and decree of the court of May 31, 1960, (rehearing denied June 29, 1960) is *final* and *absolute* with respect to their right to be protected against another trial for the same offense, if petitioners are correct in their position that they have already been in jeopardy in the first trial for the offense in this case. The protection

against double trial is irretrievably lost if the petitioners are forced to defend themselves again in the lower court.

II

LOUISIANA FAILS TO PROVIDE A SYSTEM WHEREBY THE DOUBLE JEOPARDY CONCEPT HAS ANY VITALITY OR EFFECTIVE REALITY

A. The concept of double jeopardy is as venerable and important in Anglo-American society as any of the other guarantees contained in the State and Federal Bill of Rights. The Federal Constitution and all State Constitutions specifically protect against double jeopardy. Unfortunately, however, the concept has never been satisfactorily implemented (except as otherwise indicated below) by legislation. See *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339 (1956). It is true that the courts in many jurisdictions have attempted to develop implementary rules for the double jeopardy concept, but as a whole these have been unsatisfactory. For example, the so-called "same evidence test" was apparently first developed in the case of *Rex vs. Vandercombe*, 168 Eng. Rep. 455 (1796). Subsequent variations of the *Vandercombe* rule are discussed in Note 20, at p. 322 of 39 Iowa L. Rev. 317 (1954):

> "The formula has also been reversed, namely, a former trial will not be a bar to a subsequent prosecution unless the defendant could have been convicted of the offense charged in the subsequent trial on the evidence offered in the former. This

> has been called the rule of the Vandercombe case backwards. Another variation combines the rule and the rule backwards to the effect that jeopardy upon one indictment is no bar to jeopardy upon a subsequent indictment unless the evidence required to support a conviction upon either of them would have been sufficient to warrant a conviction upon the other."

Another test applied with similar groping and unsatisfactory results has been the so-called "same transaction test." This test is in fact a broadening of the "same offense" test and has been stated as follows:

> "A plea of double jeopardy is good if both offenses are part of the same criminal transaction." See 39 Iowa L. Rev. 317 at 323.

This test has been adopted by Alabama, Georgia, Indiana, Michigan, Oklahoma, Tennessee, Texas, Vermont and West Virginia. 7 Brooklyn Law Review 79 at 84 (1937). But the difficulty in applying this test was exposed by the Supreme Court of Georgia in *Harris v. State*, 193 Ga. 109, 17 S. E. 2d. 573 (1941):

> "It appears that the necessity for ingrafting the various exceptions upon the original abstract statement of the same evidence rule has caused the courts of some states, including this state, to repudiate its efficacy as a sound and controlling test. They have therefore some other more definite rule, and, in so doing have adopted what is known as the same transaction test. In the language of the

> same transaction test, the question is: What constitutes the same transaction? The test lacks the much to be desired element of being definite and specific. It therefore appears that this court in numerous decisions, although recognizing as controlling the same transaction test, in its efforts to elucidate what in fact constitutes the same transaction, has nevertheless applied elements pertaining to the same evidence rule; and in so doing has recognized the generally approved principal that in order for the transaction to be the same, it must be identical both as a matter of fact and as a matter of law."

As a result of this confusion, Minnesota, which had adopted the same transaction test, later abandoned it. *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353 (1937). Apparently Louisiana has never applied the same transaction test. See *State v. Hill*, 122 La. 711, 48 So. 160 (1909); *State v. Barrett*, 121 La. 1058, 46 So. 1016 (1908); *State v. Roberts*, 170 La. 727, 129 So. 144 (1930).

Both the "same evidence" and the "same transaction" tests have been severely criticized as failing to properly protect the constitutional right of double jeopardy. See 65 Yale L. Journal at 348-49 (1956); 58 Yale L. Journal 513 (1949). The author of the comprehensive work on this subject in 39 Iowa L. Review 317 (1954) rather poignantly states in a note on pp. 328-9, the following:

> "To confess, the writer of this paper thought that a rather comprehensive study of the cases in point might reveal some common objective of the courts;

but the effort was fruitless. Others have tried; the same result followed as one concluded. It appears that most legal writers attempt, through a comparative examination of cases on double jeopardy, piling one upon another, Pilion on Ossa, to discover some common denominator determining the meaning of same offense. In endeavoring, however, to formulate some universally applicable rule, most of them find themselves making a distinction without a difference."

The Louisiana jurisprudence relied upon by the court in the instant case, *which predates the 1928 code of Criminal Procedure*, apparently uses the "same evidence test." This former jurisprudence involves the same difficulties as was experienced in other states in using this test, and is subject to the same criticism. It is submitted that the Louisiana *jurisprudential implementation* of the double jeopardy concept has not been any more satisfactory in this state than it has been in other states.

B. However, in 1928 Louisiana adopted a new code of criminal procedure after two years of study by a commission of experts, and it is submitted that the Louisiana *statutory implementation* of the double jeopardy concept contained in that code was, *as it originally existed*, one of the best ever conceived or written. The system consisted of five articles which read together as integral parts of a cohesive, comprehensive and integrated code, provided a perfect system for the protection of the constitutional right of double jeopardy. These articles were:

Article 218: "When two or more crimes *result from a single* transaction, or from *one continuous unlawful transaction, only one indictment will lie;* but each of said distinct crimes, though some of them be felonies and others of them misdemeanors, may be separately joined in distinct counts of the same indictment." (Italics added)

Article 279: "To constitute former jeopardy it is necessary that the court in which the former trial took place had jurisdiction, and was legally constituted; that the former acquittal or conviction was rendered on a sufficient indictment; that the proceedings ending in the former acquittal or conviction were valid; that the former verdict rendered *was responsive to some charge contained in the indictment* and was of such form as to be the basis of a valid judgment; and that the offense formerly charged and that presently charged are either identical, or different grades of the same offense, or that the one is necessarily included in the other." (Italics added).

Article 386: "Whenever the indictment sets out an offense *including other offenses of less magnitude or grade*, the judge shall charge the jury the law applicable to *all offenses of which the accused could be found guilty* under the indictment and in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter." (Italics added)

Article 405: "The verdict must be responsive to the indictment, that is to say, no one can be found guilty of an *offense not charged in the indictment or not necessarily included in the offense charged;* and no verdict can be of any effect if found upon an indictment so defective as to charge no crime." (Italics added)

Article 406: "When the crime charged *includes another of lesser grade*, a verdict of guilty of the lesser crime is *responsive to the indictment*, and it is of no moment that the greater offense is a felony and the lesser a misdemeanor." (Italics added)

It will be noted that the outstanding points of the overall system of the 1928 code in this area were the following:

1) The defendant was initially protected by the rule which required the State to join against him *all offenses* arising out of the same transaction. Art. 218, *supra.*

2) The defendant was thus put in jeopardy *at one time* for all criminal acts done by him related to one another, because in such cases "only one indictment" would lie. Art. 218, *supra.*

3) The defendant could be found guilty of *all* lesser offenses included in the *main* charges including attempts. Arts. 236, 405, and 406, *supra.*

4) The defendant was protected against repeated charges which were responsive to the original charges. Art. 279, *supra*. This included all lesser charges.

It was thus virtually impossible to have serious double jeopardy problems under this system. The compulsory joinder concept of Art. 218 removed most of the problems at the outset; and those left were taken care of by a liberal lesser included offense doctrine and a correspondingly liberal responsive verdict doctrine. Arts. 386, 405, 406. Finally with Art. 279 requiring the element of responsiveness the system was complete. Each article played its limited role as an implementation of the constitutional concept of double jeopardy, but *as a whole*, and *interacting with each other*, they provided very effective protection against repeated charges and trials growing out of the same act or set of circumstances.

It is respectfully submitted that *there can be no doubt whatever* that had the facts of the instant case occurred shortly after the enactment of 1928 code and had this case been governed by the procedure of the 1928 code, *as it originally existed*, the defendants in the instant case could not have been prosecuted again. In the first place, the robbery element of the offense would have been joined as a count in the original indictment under Art. 218. Furthermore, even if robbery had not been joined as a separate count, a verdict of guilty of simple robbery would have been responsive and proper under Article 386 and Article 406. Finally, because of all of the foregoing, Article 279 would have prevented another trial for simple robbery, conspiracy, or any charges of attempts to commit crime, since such verdicts would have been responsive to the first charge.

C. However, the excellent system devised by the authors of the 1928 code to implement the constitutional concept *has been destroyed* in Louisiana by a series of steps as indicated below so that it is respectfully submitted that the judicial and statutory implementation not only have not aided the enforcement of the double jeopardy principle but in fact *have emasculated* it to the extent that it *no longer exists* in the vigor and strength to which it is entitled in principle and historically. These emasculative steps are the following:

1) In the case of *State vs. Jacques*, 171 La. 994, 132 So. 657 (1931), Article 218 was declared unconstitutional although as indicated shortly thereafter in *State vs. White*, 172 La. 1045, 136 So. 47 (1931) it was unnecessary for the court to go so far. Nevertheless, by Act 153 of 1932, Article 218 *was repealed* and thus the Legislature by this step, *removed one of the most important statutory implementations* to the double jeopardy concept, to-wit: the requirement that all related offenses be charged and tried at the same time, and if not, further prosecution was impossible.

2) Art. 26 of the Criminal Code was adopted in 1942 and specifically permits a conspiracy to be charged and tried as an independent crime. R. S. 14:26. This of course at one step doubled the possible number of trials for any single act in which more than one person participated.

3) In 1948 Article 386 was amended so as to restrict the responsive verdict concept by providing that

only a limited number of verdicts would be responsive to charges, whereas prior to this 1948 amendment under Article 386 and Article 406, there was great liberality as to responsive verdicts. Although Mr. Dale Bennett of the faculty of the Louisiana State University law school warned in 9 La. L. Rev. 41-45 that the 1948 amendment with respect to responsive verdicts should not impinge upon substantive constitutional rights, it is respectfully submitted that *exactly that has happened*, as is indicated in sub-paragraph 5 following.

4) The 1948 amendment to Art. 386 (R.S. 15:386) had the collateral effect also of making it impossible on a charge of any offense to find a verdict of guilty of an attempt to commit that offense which until 1948 was permitted by R. S. 14:27. Thus, the 1948 amendment had the effect of doubling all possible charges by allowing and indeed requiring a separate charge for an attempt to commit a crime, even though there had been an acquittal on the charge of committing the same crime.

5) The final step in the emasculation of the Louisiana system of statutory implementation of the double jeopardy concept *has taken place in the instant case.* The Supreme Court of Louisiana has found that unless the jury could have found a verdict of guilty of simple robbery under the murder charge, then the defendant was never in jeopardy for that offense. Yet this can be so *only because the original Louisiana system* has been destroyed step by step as indicated above.

D. The result of all of the foregoing may be shown by the following possible charges arising out of a single act, even though the defendant is acquitted in each trial:

First Example: (Based on facts of this case)

First charge: Murder. Verdict: acquittal
Second Charge: Armed Robbery. Verdict: acquittal
Third charge: Theft. Verdict: acquittal
Fourth Charge: Attempted Murder. Verdict: acquittal
Fifth Charge: Attempted Armed Robbery. Verdict: acquittal
Sixth through Eighth Charges: Conspiracy to commit any of the first three charges.

Second Example: (Taking another set of facts, to-wit the single act of killing a man by hitting him with a baseball bat.)

First Charge: Murder. Verdict: acquittal
Second Charge: Negligent homicide. Verdict: acquittal
Third Charge: Aggravated Battery. Verdict: acquittal
Fourth Charge: Aggravated Assault. Verdict: acquittal
Fifth Charge: Attempted Murder. Verdict: acquittal
Sixth Charge: Attempted Aggravated Battery. Verdict: acquittal
Seventh Charge: Attempted aggravated assault. Verdict: acquittal
Eighth through Tenth Charges: Conspiracy to commit the first, third and fourth charges.

In all of these cases the same fundamental acts are involved and necessarily each involves different elements.

But, under the doctrine of the instant decision, because no responsive verdict in any one case could have been rendered as to the other case, and because of the joinder rules discussed *supra*, the defendant is denied the *reality* of the protection of the double jeopardy provision.

It is submitted that these results would have been *impossible* under the 1928 code *as originally drawn*. It is further submitted that, as illustrated above, Louisiana is now left with a system which in fact gives no substantial guarantee against double, triple, quadruple and more prosecutions for the same offense.

It is not the fault of the defendants, *nor are their constitutional rights in any degree lessened*, by this progressive destruction of the statutory system of implementation.

LOUISIANA MUST PROVIDE BY LEGISLATION OR BY JURISPRUDENCE OR BOTH, A SYSTEM WHICH WILL MAKE THE BARE WORDS OF THE CONSTITUTION VITAL AND EFFECTIVE REALITIES. IF IT DOES NOT DO SO, OR IF HAVING ORIGINALLY DONE SO, IT HAS DESTROYED ITS SYSTEM, THERE IS A LACK OF DUE PROCESS UNDER THE 14th AMENDMENT OF THE FEDERAL CONSTITUTION.

E. Petitioners invoke the protection of the 14th Amendment of the United States Constitution. In the case of *Palko vs. Conn.*, 302 U.S. 319, 58 Sup. Ct. 149 (1937), the defendant was acquitted of murder but under a peculiar Connecticut statute, the State was allowed to appeal to correct an error made against the State during the trial. The appeal resulted in a reversal and a new trial, and on

the second trial the defendant was convicted. On appeal to the Supreme Court of the United States the defendant contended that his rights under the 14th Amendment had been violated. Mr. Justice Cardozo in that case analyzed the guarantees of the first ten amendments of the Federal Constitution, the violation of which constitutes a violation of the 14th Amendment "by the process of absorption." Justice Cardozo developed categories of the denial of some rights which fall within the ambit of the 14th Amendment and other categories of the denial of other rights which do not fall within the ambit of the 14th Amendment. Having done this he then asked where the right of protection against double jeopardy fell, and at page 328 he answered the question as follows:

> "On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has submitted him a hardship so acute that our policy will not endure it? Does it involve those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"

He answered this question "No", but said:

> "What the answer would have to be if the States were permitted after a trial free from error to try the accused over again, or to bring another case against him, we have no occasion to consider."

It is submitted that the case clearly shows that the United States Supreme Court is concerned and will be con-

cerned with state laws and decisions which do not fully guarantee protection against double jeopardy.

Other cases following *Palko* indicate that double jeopardy in state criminal prosecutions is indeed a matter of due process under the 14th Amendment. As the court said in *Brock v. North Carolina*, 344 U.S. 424, 73 Sup. Ct. 349 (1953):

> "The pattern of due process is picked out in the facts and circumstances of each case."

The test developed in the *Brock* case and in *Hoag v. New Jersey*, 356 U.S. 464, 78 Sup. Ct. 829 (1957) is whether in final effect a state forces a defendant to "run the gauntlet twice." See also *Ciucci vs. Illinois*, 356 U.S. 571, 78 Sup. Ct. 839 (1958). *Green vs. United States*, 355 U.S. 184, 78 Sup. Ct. 221 (1957).

Another illustration of the growing concern of the Supreme Court of the United States in this area of constitutional law since the *Palko* decision is *Williams v. Oklahoma*, 358 U.S. 576, 78 Sup. Ct. 421 (1959). See also *Bartkus vs. Illinois*, 359 U.S. 141, 79 Sup. Ct. 676 (1959); *Abbate vs. United States*, 359 U.S. 187, 79 Sup. Ct. 666 (1959).

As indicated in sub-paragraph D *supra*, Louisiana allows the prosecution to force a defendant to "run the gauntlet" many times.

F. Petitioners reiterate the point that so long as the felony-murder doctrine exists, it is impossible to say that

a person is not in jeopardy because of the felony, when without proof of the felony, he cannot be convicted of murder. Under the felony-murder doctrine, the felony is the keystone of the charge, and it is because, and *only* because, of the felony a defendant is in any danger at all. A system of procedure which closes its eyes to this fact, is at the same time blinding itself as to the overriding constitutional right involved. It is utterly unrealistic to say that a man is not in danger as to a felony, when if there is no proof of the felony, he is in no danger at all, but if there is proof of it, he may be electrocuted. In fact it is *only the felony* which makes the charge dangerous at all; and having endured the danger once, he should not have to endure it again. A state which by its laws or jurisprudence offers no protection against this result has indeed a *moribund* double jeopardy clause in its constitution. See 65 Yale Law Journal 339 (1956), *supra*.

G. Petitioners anticipate that it will be said against their argument that it would leave them untouched and untouchable as to their possible offense of simple robbery. Their answer to this is that it may be so, but that their constitutional rights are superior and more important than any technical result. It may be indeed that the Louisiana system from the State's point of view is defective; this defect, like many others which violate constitutional rights, may be corrected by legislation — or simply by returning to the system of the original 1928 code. But if petitioners are right, the by-product that they may never answer for the offense of simple robbery, should not be used to deny to them their constitutional rights.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

HUBERT, BALDWIN & O'HARA

By _____
Counsel for Albert Calyo and John Farrell

By _____
Counsel for David Drennan

CERTIFICATE

I HEREBY CERTIFY that copy of this petition has been mailed today to the Honorable Jack P. F. Gremillion, Attorney General, State of Louisiana, Baton Rouge, Louisiana, and to the Honorable Richard A. Dowling, District Attorney, Parish of Orleans.

_____

APPENDIX A

DECISION OF SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus

ALBERT CALVO, DAVID DRENNAN AND JOHN FARRELL.

No. 44991.

Supreme Court of Louisiana

May 31, 1960.

Rehearing Denied June 29, 1960.

SIMON, Justice.

Albert Calvo, David Drennan and John Farrell were originally charged in a bill of indictment with the crime of murder under LSA-R.S. 14:30[1] in that " * * * on the 28th day of September, 1958 * * * they murdered one Fernando Rios * * * ."

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[1] "Murder is the killing of a human being.

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery even though he has no intent to kill.

"Whoever commits the crime of murder shall be punished by death."

Pursuant to the defendants' motion for a bill of particulars, the district attorney filed an answer particularizing that the defendants would be tried under Section 2 of the quoted statute, supra, and that the State would contend that all of the defendants killed the victim while engaged in the perpetration or attempted perpetration of simple robbery, tersely stated, a prosecution under the felony-murder doctrine.

Following the trial on this bill of indictment all three defendants were acquitted, whereupon the Grand Jury of the Parish of Orleans returned a second indictment charging the three defendants with the offense of conspiracy to commit simple robbery[2] and with simple robbery[3] in two separate counts. To this charge the defendants filed a plea of autrefois acquit and former jeopardy as bars to their further prosecution. The district court sustained the plea and discharged the defendants, from which judgment the State has appealed.

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[2]LSA-R.S. 14:26:

"Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; * * *

"Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

* * * *

"Whoever is a party to a criminal conspiracy to commit the crimes of theft * * * shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both * * *."

[3]LSA-R.S. 14:65:

"Simple robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon.

"Whoever commits the crime of simple robbery shall be imprisoned with or without hard labor, for not more than five years."

For pertinency to this case, LSA-R.S. 14:30, supra, may be read as follows:

> "Murder is the killing of a human being * * * when the offender is engaged in the perpetration or attempted perpetration of * * * simple robbery, even though he has no intent to kill."

The basis of these pleas is that the appellees cannot now be prosecuted for simple robbery and conspiracy to commit simple robbery for the reason that they have been previously acquitted of the crime of murder committed while engaged in the act of simple robbery; that simple robbery is a component and indissoluable part of the felony-murder offense itself and necessarily included therein; that the state introduced evidence at the murder trial of the perpetration or attempted perpetration of simple robbery. Hence, they contend that former jeopardy attaches and their acquittal bars a second trial on the lesser offense of simple robbery and that of criminal conspiracy.

The pertinent part of Section 9, Article 1 of the Constitution, LSA reads:

> "* * * *nor shall any person be twice put in jeopardy of life or liberty for the same offense*, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." (Italics ours.)

See LSA-R.S. 15:274, wherein is set out verbatim the aforestated constitutional provision.

[1] The Legislature guaranteed against any doubt or dispute as to what offense or offenses are former jeopardy offenses in relation to some other offense in enacting LSA-R.S. 15:279, the pertinent portion of which reads:

> "To constitute former jeopardy it is necessary, that * * * the offense formerly charged and that presently charged are either identical, or different grades of the same offense, or that the one is necessarily included in the other."

The term "jeopardy" as used in our law designates the danger of conviction and punishment which a defendant in a criminal prosecution incurs when a valid indictment or information has been found or complaint presented, and a petit jury has been empaneled and sworn to try the case and give a verdict in a tribunal of competent jurisdiction.

In the search of an inclusive and easily applied formula determinative of the issue of former jeopardy, our jurisprudence has established fixed tests or rules. In the leading case of State v. Foster, 156 La. 891, 101 So. 255, 258, three different tests were stated with approval. In that case the defendant was acquitted of the crime of attempted arson. During the trial of the case the State introduced evidence to the effect that the defendant had assaulted and beaten the owner of the dwelling house immediately preceding the attempted arson. After the acquittal of the defendant under the charge of attempted arson, the district attorney filed an information charging the defendant with an assault and battery. After a conviction on said latter charge, the sentence not being within our appellate juris-

diction, the defendant invoked our supervisory jurisdiction in order to have the errors of which he complained reviewed, one of which was the plea of autrefois acquit and former jeopardy to his prosecution for assault and battery, these latter pleas have been overruled below. It was urged before us that the defendant could not be prosecuted for the lesser charge for the reason that he had been previously acquitted of the crime of attempt to commit arson and had been placed in jeopardy on the former trial as to the assault and battery because the State had introduced evidence showing that the defendant had assaulted and beaten the owner of the dwelling house immediately preceding the attempted arson, and that the second trial was had upon the same evidence as adduced in the former trial. In dealing with the "same evidence" formula, we declared that:

> "'The test whether the plea of autrefois acquit is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to have procured a legal conviction on the first.' State v. Williams, 45 La. Ann. 936, 12 South 932; State v. Keogh, 13 La. Ann. 243; State v. Vines, 34 La. Ann. 1079; State v. Helveston, 38 La. Ann. 314; State v. Faulkner, 39 La. Ann. 811, 2 South 539."

As to the "substantial identity test," meaning that a defendant has been formerly tried and acquitted of the same offense, we said:

> "To render the plea of a former acquittal a bar, it must be a legal acquittal, by a judgment upon

trial, for substantially the same offense * * * Blackstone, vol. 4, p. 355; Chitty, Crim. Plead. p. 376; State v. Brown, 8 Rob. 566; State v. Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State v. Walters, 16 La. Ann. 400."

[2] While formal, technical and absolute identity of the offenses is not necessary, yet substantial identity is an essential element in support of a plea of autrefois acquit. State v. Roberts, 152 La. 283, 93 So. 95, 24 A.L.R. 1122.

In the Foster case, supra, we approved a further test, that is, whether the evidence required to legally secure a conviction on the charge preferred in the first indictment would be sufficient to convict on the charge preferred in the second, or if the offense charged in the first includes the one charged in the second, or if the one charged in the second includes the one charged in the first. State v. Yokum, 155 La. 846, 99 So. 621; State v. Terry, 128 La. 680, 55 So. 15; State v. Williams, 45 La. Ann. 936, 12 So. 932; State v. Vines, 34 La. Ann. 1079; State v. Anderson, 135 La. 326, 65 So. 478; State v. Heard, 107 La. 60, 31 So. 384; State v. Hill, 122 La. 711, 48 So. 160; State v. Barrett, 121 La. 1058, 46 So. 1016; State v. Xenos, 138 La. 113, 70 So. 55; State v. Malone, 28 La. Ann. 80.

Accordingly, we held that the plea having failed to meet the aforestated test and formula, the pleas of autrefois acquit and former jeopardy were properly overruled.

In Marr's Criminal Jurisprudence, p. 580, it is said that

> " * * * identity of the offense is an essential element in support of a plea of autrefois. By this is not meant formal, technical, absolute identity; the rule is that there must be only substantial identity, that evidence necessary to support the second indictment would have been sufficient for the first."

In State v. Monterieffe, 165 La. 296, 115 So. 493, 494, the defendant was indicted and prosecuted for larceny of property. After his conviction he urged on appeal his plea of double jeopardy in that he had been previously charged with and acquitted of the offense of burglary; that both indictments for burglary and larceny were for the same act, the major charge including the lesser, and that since he had been acquitted of the major charge a trial upon the second indictment would constitute double jeopardy. We therein recognized that burglary and larceny are distinct offenses even though the larceny of property was committed as a concurring act with the burglary. We further recognized that burglary and larceny being separate offenses, even though the jury had acquitted the defendant on the charge of burglary, it could not in that instance have convicted or acquitted him of the charge of larceny, the latter not being an ingredient of the crime of burglary, nor would a verdict of guilty of larceny have been a responsive verdict of the charge of burglary. We again recognized the true test to be whether on the former trial the accused could have been convicted of the crime charged against him on the second trial, reaffirming the pronouncements in State v. Terry, supra; State v. Yokum, supra; State v. Foster, supra. We further stated: "The fact that a person commits several separate and distinct crimes at the same time, or in immediate consecu-

tive order, is no reason why he should not be indicted and tried for each of said crimes. This rule is so universally recognized and applied that any citation of authority would be superfluous." See State v. Roberts, supra; State v. Fradella, 164 La. 752, 114 So. 641; State v. O'Banion, 171 La. 323, 131 So. 34.

In the recent case of Williams v. Oklahoma, 358 U.S. 576, 79 S. Ct. 421, 427, 3 L. Ed. 2d 516, the Supreme Court of the United States held that a conviction and life sentence for murder did not bar a subsequent conviction and capital sentence for kidnapping growing out of the same transaction, since murder and kidnapping under Oklahoma law are two separate crimes. In that case the facts disclose that after robbing a filling station attendant and eluding police in an ensuing chase, the defendant forced his way into an automobile being driven by one Cook, and at gunpoint forced Cook to drive throughout northeastern Oklahoma, and at a deadend point in the road shot and killed him, then escaping in the car. Upon arraignment the defendant entered a plea of guilty to the charge of murder, and was sentenced to life imprisonment. Thereafter the defendant was charged with kidnapping the deceased and on arraignment entered a plea of guilty as charged, receiving a death sentence. On appeal it was contended that he was punished twice for the same offense. In sustaining the sentence pronounced by the court below, the Supreme Court of the United States declared that under the laws of Oklahoma murder and kidnapping are not the same offense, being separately created and defined, thereby being separate and distinct offenses. The court further declared:

"* * * And in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment."

The conditions under which a plea of former jeopardy is valid are set out in Corpus Juris Secundum:

"The prohibition of the common law and of the constitutions is against a second jeopardy for the same 'offense,' that is, for the identical act and crime; or, as expressed in a number of cases, to entitle accused to plead successfully former jeopardy, the offenses charged in the two prosecutions must be the same in law and in fact * * *. It is not necessarily decisive that the two offenses may have some material fact or element in common, or that they are similar, where they are not in fact the same, as the test is not whether accused has already been tried for the same *act*, but whether he has been put in jeopardy for the same *offense*." (Italics ours.) 22 C.J.S. Criminal Law § 278.

Archbold, Pleading Evidence and Practice in Criminal Cases, 145-46 (29 Ed. 1934), states the rule as follows:

> "The principle on which the right of autrefois acquit * * * depends is that a man shall not be put twice in jeopardy for the *same matter*." (Italics ours.)

Also, in the same text, the following appears:

> "Whether the facts are the same in both trials is not a true test: the test is rather whether the acquittal on the first charge necessarily involves an acquittal on the second charge." 3

In the case at bar the accused were originally tried for the crime of murder under the fiction of our felony-murder doctrine and were acquitted. In the present instance, the defendants are charged with and indicted for the offense of conspiracy to commit simple robbery and with having committed simple robbery each in separate counts.

[3] The offense of criminal conspiracy and that of simple robbery are separate and distinct crimes from the offense of murder as defined, supra. The facts justifying the charge of criminal conspiracy and that of simple robbery are quite distinct from the facts warranting the charge of murder. Manifestly, they are not identical nor do the former two crimes constitute a grade of the offense of murder. Conspiracy and simple robbery are independent offenses from that of murder; and it cannot be justifiably asserted that the former constitute a graduated lesser crime to that of the greater crime of murder. Hence, it is obvious that there is no substantial identity of the crimes to justify the support of the plea of autrefois acquit.

[4-6] Nor can it be said that the crime of robbery or that of criminal conspiracy is necessarily included in the crime of murder. In the original bill of indictment the defendants were not specifically charged with conspiracy to commit simple robbery, nor were they charged with simple robbery. The only responsive verdicts to a charge of murder are: (1) guilty as charged; (2) guilty without capital punishment; (3) guilty of manslaughter; and (4) not guilty. These responsive verdicts are totally exclusive. The jury, on the indictment of murder, or an indictment on our felony-murder doctrine (LSA-R.S. 14:30, Section 2, supra), would have been legally powerless to have returned a verdict of guilty of simple robbery or that of criminal conspiracy; and if perchance such were to occur, such a verdict would not only be invalid but would have been declared a nullity by the court receiving it; nor can it be said that the indictment in the present instance places the defendants on trial for the offense charged in the original indictment.

[7] To justify a plea of former jeopardy the two offenses must be the same in both law and fact; and it cannot be urged that the defendants could have been convicted of the crime charged against them in the instant indictment on a trial for the offense of murder. There exists no analogy or affinity of ingredients and essentials in the offenses of murder and that of robbery or criminal conspiracy. It is not the act in the commission of two crimes which controls. The question to be resolved is whether the offenses are the same, or whether one is necessarily included in the other so as to make the plea of former jeopardy amenable to a defendant. Manifestly, on the trial of murder these defendants could not have

been convicted of the crime of conspiracy and or of simple robbery charged against them in the second bill of indictment; nor can it be contended that the evidence necessary to support the second indictment would have been legally sufficient to have obtained a conviction on the first indictment of murder.

[8, 9] It may be argued that the "same evidence" test should be made applicable since it appears that evidence substantiating the commission of simple robbery and conspiracy was presented by the State to the jury in seeking a conviction in the trial of the murder charge. Conceding this to be true, such evidence was admissible as part of the res gestae, but that fact alone does not place the defendants in jeopardy for the offense charged in the second bill of indictment for the obvious reason that they could not have been convicted of the crime of robbery or criminal conspiracy. Furthermore, we have held on several occasions that two or more crimes may be committed at the same time or result from the same act or unlawful transaction and may be separately indicted and separately tried. See authorities heretofore cited.

Because simple robbery and criminal conspiracy are not elements in the crime of murder nor essentially included therein, being separate, distinct and independent offenses under our law, and a verdict and conviction for the offense of criminal conspiracy and or simple robbery were not legally obtainable in the trial for the offense of murder, we necessarily conclude that the pleas of autrefois acquit and former jeopardy cannot be invoked in bar of prosecution under the instant bill of in-

dictment. See State v. Coleman, 236 La. 629, 108 So. 2d 534.

Accordingly, for the reasons assigned, the judgment of the lower court is reversed, annulled and set aside, and the pleas of autrefois acquit and former jeopardy are overruled; and the case is remanded to the district court for such proceedings as are consistent with the views herein expressed and the law applicable.

FOURNET, C. J., absent.

APPENDIX B

TEXTS OF PERTINENT LOUISIANA LAW

1. *RULE XII (3)*

When a case has been decided on rehearing, another petition for a rehearing will not be considered unless the applicant has not theretofore applied for and been granted a rehearing or unless the court in deciding the case on rehearing, has expressly reserved to the unsuccessful party or parties the right to apply for another rehearing.

2. *R.S. 14:26*

Criminal conspiracy. (pertinent parts only)

Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided than an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

Where the intended basic crime has been consummated, the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

3. *R.S. 14:30*

Murder

Murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

4. *R.S. 14:27*

Attempt (pertinent parts only)

An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

5. *R.S. 15:218 (repealed in 1932.)*

When two or more crimes result from a single transaction, or from one continuous unlawful transaction, only one indictment will lie; but each of said distinct crimes, though some of them be felonies and others of them misdemeanors, may be separately joined in distinct counts of the same indictment.

6. *R.S. 15:279*

Requisites for former jeopardy

To constitute former jeopardy it is necessary, that the court in which the former trial took place had

jurisdiction, and was legally constituted; that the former acquittal or conviction was rendered on a sufficient indictment; that the proceedings ending in the former acquittal or conviction were valid; that the former verdict rendered was responsive to some charge contained in the indictment and was of such form as to be the basis of a valid judgment; and that the offense formerly charged and that presently charged are either identical, or different grades of the same offense or that the one is necessarily included in the other.

R.S. 15:386 (as originally enacted)
Whenever the indictment sets out an offense including other offenses of less magnitude or grade, the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment and in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter.

R.S. 15:386 (as amended in 1948) (pertinent parts only)
Whenever the indictment sets out an offense including other offenses of less magnitude or grade the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment. The only responsive verdicts which may be rendered, and upon which the judge shall charge the jury, where the indictment charges the following offenses are:

Murder:
Guilty as charged.
Guilty without capital punishment.
Guilty of manslaughter.
Not guilty.

Attempted Murder:
Guilty as charged
Guilty of attempted manslaughter.
Not guilty.

Manslaughter:
Guilty as charged.
Not guilty.

Attempted Manslaughter:
Guilty as charged.
Not guilty.

Negligent Homicide:
Guilty as charged.
Not guilty.

Aggravated Battery:
Guilty as charged.
Guilty of simple battery.
Not guilty.

Aggravated Assault.
Guilty as charged.
Guilty of simple assault.
Not guilty.

Armed Robbery:
Guilty as charged.
Guilty of simple robbery.
Not guilty.

Attempted Armed Robbery:
Guilty as charged.
Guilty of attempted simple robbery.
Not guilty.

Theft:
Guilty of theft of property of _____ dollars value.
Guilty of attempted theft.
Guilty of unauthorized use of movables.
Not guilty.

Attempted Theft:
Guilty as charged.
Guilty of attempted unauthorized use of movables.
Not guilty.

9. *R.S. 15:405*

Responsiveness to indictment

The verdict must be responsive to the indictment, that is to say, no one can be found guilty of an offense not charged in the indictment or not necessarily included in the offense charged; and no verdict can be of any effect if found upon an indictment so defective as to charge no crime.

10. *R.S. 15:408*

Verdict where crime charged includes lesser crime

When the crime charged includes another of lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment, and it is of no moment that the greater offense is a felony and the lesser a misdemeanor.